

ARGUMENT NOT YET SCHEDULED

No. 21-1048
(Consolidated with Nos. 21-1055, 21-1056,
21-1179, 21-1227, 21-1229, 21-1230, 21-1231)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DON'T WASTE MICHIGAN, et al.,
Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

INTERIM STORAGE PARTNERS LLC,
Intervenor.

ON APPEAL FROM THE
NUCLEAR REGULATORY COMMISSION

**BRIEF OF AMICUS CURIAE NATURAL RESOURCES DEFENSE
COUNCIL IN SUPPORT OF PETITIONER**

March 25, 2022

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The petitioner is Beyond Nuclear. The respondents are the U.S. Nuclear Regulatory Commission and the United States of America. The intervenor-respondent is Interim Storage Partners LLC.

In this Court, the Natural Resources Defense Council appears as amicus curiae supporting Petitioner Beyond Nuclear. The City of Fort Worth also appears as amicus curiae supporting Petitioner Beyond Nuclear.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioner Beyond Nuclear.

C. Related Cases

A list of related cases appears in the Brief for Petitioner Beyond Nuclear.

RULE 26.1 DISCLOSURE STATEMENT

Amicus curiae Natural Resources Defense Council is a private 501(c)(3) non-profit organization with no parent corporation, and no publicly held corporation owns any of its stock.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
GLOSSARY	viii
STATUTES AND REGULATIONS.....	1
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
RULE 29 STATEMENT	3
INTRODUCTION	4
STATUTORY AND FACTUAL BACKGROUND.....	5
I. Original Debates	7
II. A Comprehensive U.S. Statutory Scheme.....	10
III. Continuing Efforts.....	11
IV. The Blue Ribbon Commission.....	12
V. Recent Congressional Action on Nuclear Waste.....	16
ARGUMENT.....	17
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<i>In re Aiken County</i> 725 F.3d 255 (D.C. Cir. 2013)	19
<i>Balt. Gas & Elec. Co. v. NRDC</i> 435 U.S. 964 (1978).....	2
<i>Bullcreek v. NRC</i> 359 F. 3d 536 (D.C. Cir. 2004)	11
<i>Nat’l Ass’n of Regul. Util. Comm’rs v. U.S. Dep’t of Energy</i> 736 F.3d 517 (D.C. Cir. 2013)	12
<i>New York v. NRC</i> 681 F.3d 471 (D.C. Cir. 2012)	2
<i>New York v. NRC</i> 824 F.3d 1012 (D.C. Cir. 2016)	2, 20, 21
<i>NRDC v. EPA</i> 824 F.2d 1258 (1st Cir. 1987).....	2, 6
<i>Nuclear Energy Inst. v. EPA</i> 373 F.3d 1251 (D.C. Cir. 2004)	2, 3, 6
<i>Vt. Yankee Nuclear Power Corp. v. NRDC</i> 435 U.S. 519 (1978).....	2

Statutes

Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (2)(C)	4
Nuclear Waste Policy Act, 42 U.S.C. § 10131(b)	6
§ 10131	6
§ 10143	6, 10

§ 10151.....	6
§§ 10151-57.....	10
§§ 10161-69.....	10
§ 10162(a).....	11
§ 10222(a)(5)(A).....	6, 10

Administrative Decisions

Holtec Int'l

91 N.R.C. 167 (2020).....	17
---------------------------	----

In the Matter of Interim Storage Partners LLC

92 N.R.C. 463, 467 (2020).....	17
--------------------------------	----

Legislation

Interim Consolidated Storage Act of 2017

H.R. 474, 115th Cong. (2017).....	16
-----------------------------------	----

Interim Consolidated Storage Act of 2016

H.R. 4745, 114th Cong. (2016).....	16
------------------------------------	----

Interim Consolidated Storage Act of 2015

H.R. 3643, 114th Cong. (2015).....	17
------------------------------------	----

Nuclear Waste Administration Act of 2019

S. 1234, 116th Cong. (2019).....	16
----------------------------------	----

Nuclear Waste Administration Act of 2015

S. 854, 114th Cong. (2015).....	17
---------------------------------	----

Nuclear Waste Administration Act of 2013

S. 1240, 113th Cong. (2013).....	17
----------------------------------	----

Nuclear Waste Administration Act Of 2012

S. 3469, 112th Cong. (2012).	17
------------------------------------	----

Nuclear Waste Informed Consent Act

S. 541, 117th Cong. (2021).....	16
---------------------------------	----

<i>Nuclear Waste Informed Consent Act</i> H.R. 1524, 117th Cong. (2021).....	16
<i>Nuclear Waste Informed Consent Act</i> S. 649, 116th Cong. (2019).....	16
<i>Nuclear Waste Informed Consent Act</i> H.R. 1544, 116th Cong. (2019).....	16
<i>Nuclear Waste Policy Amendments Act of 2019</i> H.R. 2699, 116th Cong. (2019).....	16
<i>Nuclear Waste Policy Amendments Act of 2018</i> H.R. 3053, 115th Cong. (2017).....	16
<i>Nuclear Waste Task Force Act of 2021</i> S. 2871, 117th Cong. (2021).....	16
<i>Nuclear Waste Task Force Act of 2021</i> H.R. 5401, 117th Cong. (2021).....	16
<i>Removing Nuclear Waste from our Communities Act of 2017</i> H.R. 4442, 115th Cong. (2017).....	16
<i>STORE Nuclear Fuel Act of 2019</i> H.R. 3136, 116th Cong. (2019).....	16

Miscellaneous

Blue Ribbon Comm'n on America's Nuclear Future, Report to the Secretary of Energy (2012), https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf	5, 7, 12-16, 19-21
H.R. Rep. No. 97-491, pt. 1 (1982).....	5, 6, 7, 8, 10
Michael A. Mullett, <i>Financing for Eternity the Storage of Spent Nuclear Fuel: A Crisis of Law and Policy Precipitated by Electric Deregulation Will Face New President</i> , 18 Pace Envtl. L. Rev. 383 (2001).....	11

Nat'l Acad. of Sci., <i>The Disposal of Radioactive Waste on Land: Report of the Committee on Waste Disposal of the Division of Earth Sciences</i> (1957), https://www.nap.edu/catalog/10294/the-disposal-of-radioactive-waste-on-land	8
Nat'l Acad. of Sci., <i>Disposition of High-Level Waste and Spent Nuclear Fuel: The Continuing Societal and Technical Challenges</i> (2001), https://www.nap.edu/catalog/10119/disposition-of-high-level-waste-and-spent-nuclear-fuel-the	8
<i>Nuclear Waste Management Reorganization Act: Hearing on S. 742 Before the S. Comm. on Governmental Affairs</i> , 96th Cong. (July 5, 1979) (statement of Dr. Thomas Cochran, Senior Staff Scientist, NRDC), https://nuke.fas.org/cochran/nuc_79070501a_32b.pdf	2, 9
<i>Nuclear Waste Policy Amendments Act of 2019: Hearing on S. ___ Before the S. Comm. on Env't & Public Works</i> , 116th Cong. (May 1, 2019) (statement of Geoffrey H. Fettus, Senior Attorney, NRDC), https://www.epw.senate.gov/public/_cache/files/4/6/460c517c-edce-41cd-a7df-a37accf8f9f4/AE893E1E168B3648E465F050D50880AF.05.01.2019-fettus-testimony.pdf	2
<i>Nuclear Waste Administration Act of 2019: Hearing on S. 1234 Before the S. Comm. on Energy & Nat. Res.</i> , 116th Cong. (June 27, 2019) (statement of Geoffrey H. Fettus, Senior Attorney, NRDC), https://www.energy.senate.gov/services/files/0BF5FFBC-A14A-43AA-8364-BACE1BEAF26C	2, 5, 17, 20
Office of Management and Budget, <i>Terminations, Reductions, and Savings: Budget of the U.S. Government, Fiscal Year 2011</i> (Feb. 1, 2010).....	12
Richard B. Stewart & Jane B. Stewart, <i>Solving the Spent Nuclear Fuel Impasse</i> , 21 N.Y.U. Envtl. L.J. 1 (2014)	10, 12
U.S. Congress, Office of Tech. Assessment, <i>Managing the Nation's Commercial High-Level Radioactive Waste</i> (1985), https://ota.fas.org/reports/8514.pdf	9

U.S. Comptroller General, Report to Congress, *Nuclear Energy's Dilemma: Disposing of Hazardous Radioactive Waste Safely* (1977),
<https://www.gao.gov/assets/emd-77-41.pdf>.....9

GLOSSARY

Act	The Nuclear Waste Policy Act
Department	The Department of Energy
NRC	Nuclear Regulatory Commission
NRDC	Natural Resources Defense Council

STATUTES AND REGULATIONS

Pertinent materials are contained in Petitioner Beyond Nuclear's addendum.

STATEMENT OF INTEREST OF AMICUS CURIAE

Natural Resources Defense Council ("NRDC") is a national non-profit membership environmental organization with offices in New York City, Washington, D.C., San Francisco, Chicago, Santa Monica, Bozeman, and Beijing. NRDC has a nationwide membership of over one million combined members and activists. NRDC's activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented. Since its inception in 1970, NRDC has sought to improve the environmental, health, and safety conditions at the civil nuclear facilities licensed by the Nuclear Regulatory Commission ("NRC") and the nuclear facilities operated by the U.S. Department of Energy ("Department") and their predecessor agencies, and we will continue to do so.

NRDC has advocated for decades on the challenging matters of nuclear waste storage and disposal before Congress, Federal Agencies, and the courts. Informed by our understanding of science, law, and policy, NRDC has both succeeded and failed over the years in our attempts to hold accountable the federal government and industry to ensure that the public and environment are durably

protected from nuclear waste to the greatest extent possible.¹ NRDC has also testified dozens of times over multiple decades before Congress, relevant federal agencies, and commissions.²

NRDC's scientists and lawyers have invested decades of work on this most challenging of environmental problems. Informing our understanding is this Circuit's careful treatment in one of its (many) related judgments:

Having the capacity to outlast human civilization as we know it and the potential to devastate public health and the environment, nuclear waste has vexed scientists, Congress, and regulatory agencies for the last half-

¹ See, e.g., *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (discussing nuclear waste and licensing); *Balt. Gas & Elec. Co. v. NRDC*, 435 U.S. 964 (1978) (discussing nuclear waste and licensing); *NRDC v. EPA*, 824 F.2d 1258 (1st Cir. 1987) (associated directly with the repository program); *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004) (associated directly with the repository program); *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016).

² NRDC scientists and lawyers have appeared before Congress and federal agencies dozens of times to address nuclear waste, starting in the early 1970s and continuing to this day. See, e.g., *Nuclear Waste Management Reorganization Act: Hearing on S. 742 Before the S. Comm. on Governmental Affairs*, 96th Cong. (July 5, 1979) (statement of Dr. Thomas Cochran, Senior Staff Scientist, NRDC), https://nuke.fas.org/cochran/nuc_79070501a_32b.pdf; *Nuclear Waste Policy Amendments Act of 2019: Hearing on S. ___ Before the S. Comm. on Env't & Public Works*, 116th Cong. (May 1, 2019) (statement of Geoffrey H. Fettus, Senior Attorney, NRDC), https://www.epw.senate.gov/public/_cache/files/4/6/460c517c-edce-41cd-a7df-a37accf8f9f4/AE893E1E168B3648E465F050D50880AF.05.01.2019-fettus-testimony.pdf; *Nuclear Waste Administration Act of 2019: Hearing on S. 1234 Before the S. Comm. on Energy & Nat. Res.*, 116th Cong. (June 27, 2019) (statement of Geoffrey H. Fettus, Senior Attorney, NRDC) (includes Texas and New Mexico letters of objection – Attachments B and C of this testimony), <https://www.energy.senate.gov/services/files/0BF5FFBC-A14A-43AA-8364-BACE1BEAF26C>.

century. After rejecting disposal options ranging from burying nuclear waste in polar ice caps to rocketing it to the sun, the scientific consensus has settled on deep geologic burial as the safest way to isolate this toxic material in perpetuity.

Nuclear Energy Inst. v. EPA, 373 F.3d 1251, 1257 (D.C. Cir. 2004). Our appearance before this Court is consistent with that history and we follow with a precise presentation of why Beyond Nuclear is correct that the NRC actions under review have unlawfully exceeded its authority.

RULE 29 STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(E), NRDC certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

Pursuant to Circuit Rule 29(b), NRDC submitted its Notice of Intent to file an amicus curiae brief on March 24, 2022, noting that counsel for all parties have consented to the filing of this brief. In the Notice of Intent, pursuant to Circuit Rule 29(d), NRDC certified that NRDC and the City of Fort Worth require separate amicus briefs because the two parties represent distinct interests with diverse knowledge bases.

INTRODUCTION

Beyond Nuclear contends that the NRC violates the Administrative Procedure Act and the Nuclear Waste Policy Act (“the Act”) by approving a license for what would be, if constructed and put into operation, the world’s largest nuclear waste³ interim storage facility, because the license contemplates and by its own terms allows for storage contracts with the Department. We agree. We detail below that the fundamental purpose of the Act is to *permanently* dispose of nuclear waste. Thus, the law contains clear prohibitions to ensure that completion of that permanent solution—a repository—is not undermined by the Department’s premature assumption of nuclear waste at interim storage facilities.

This, however, is precisely what the NRC’s action allows for. The NRC’s action here thus oversteps its statutory authority. Beyond Nuclear fully addresses this in its filing. For our part, we write to highlight that the history of the Act and U.S. nuclear policy further confirms that the NRC’s issuance of Interim Storage Partner LLC’s license exceeds the agency’s powers and thereby runs afoul of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A), (C) (prohibitions against

³ There are many categories of nuclear waste. High-level nuclear waste comes from nuclear weapons production and civilian nuclear power plants. The high-level nuclear waste from civilian nuclear power plants is often called spent nuclear fuel. There are also other forms of nuclear waste not relevant here. Throughout the brief, for clarity and simplicity, we use the generic term “nuclear waste” for both high-level waste and spent nuclear fuel.

agency actions “not in accordance with law” or “in excess of statutory . . . authority”).

STATUTORY AND FACTUAL BACKGROUND

Since the beginnings of the nuclear age, attention has centered on deep geologic repositories for permanently isolating nuclear waste from the human and natural environments.⁴ At the same time, the need for interim storage and the precise contours of its linkage to permanent disposal has been a matter of controversy and debate.

In 1982, Congress mandated a subservient role for interim storage in U.S. nuclear waste policy with the passage of the Act—a law that provides the comprehensive statutory scheme for permanent disposal and interim storage of nuclear waste in the United States.⁵ *See* H.R. Rep. No. 97-491, pt. 1, at 26-30

⁴ *See* Blue Ribbon Comm’n on America’s Nuclear Future, Report to the Secretary of Energy 19-24 (2012), https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf [hereinafter “Blue Ribbon Commission Report”] (providing an overview of the history of nuclear waste disposal and storage).

⁵ NRDC has expressed views on the viability and potential for the Act. *See, e.g., Nuclear Waste Administration Act of 2019: Hearing on S. 1234 Before the S. Comm. on Energy & Nat. Res.*, 116th Cong. (June 27, 2019) (statement of Geoffrey H. Fettus, Senior Attorney, NRDC) (“NRDC views the original incarnation of the NWPA as a remarkable, nearly visionary piece of legislation that contained one tragic flaw: a deep misunderstanding of federalism and the necessary role of states.”).

(1982) [hereinafter “House Report”]; *NRDC v. EPA*, 824 F.2d 1258, 1262-63 (1st Cir. 1987). The Act defines the fundamental goal of U.S. nuclear waste policy as achieving a permanent repository. 42 U.S.C. § 10131(b). The Act also creates a “linkage” between interim storage and a permanent repository so that interim measures cannot take the place of a permanent solution. The Act gives the federal government primary responsibility for the final disposal of nuclear waste and gives generators and owners the primary responsibility for interim storage. 42 U.S.C. §§ 10131, 10151. To enforce this, the Act provides that the Department will take ownership of nuclear waste at the commencement of a repository and severely limits the two exceptions to this basic premise. *See* 42 U.S.C. §§ 10143, 10222(a)(5)(A); *see also, infra* at 10.

The reasoning behind defining the purpose of the Act as establishing a permanent repository and limiting interim storage by linking it to the operation of a repository appears in the legislative history of the Act:

The Committee strongly recommends that the focus of the Federal waste management program remain, as it is today, on the development of facilities for the disposal of [] nuclear waste *which do not rely on human monitoring and maintenance to keep the wastes from entering the biosphere.*

House Report at 29 (emphasis added). As this Court later put succinctly,

“[r]adioactive waste and its harmful consequences persist for time spans seemingly beyond human comprehension.” *Nuclear Energy Inst.*, 373 F.3d at 1258. In

passing the Act, Congress was aware of this reality and that nuclear waste “should not be a burden on future generations, and must be disposed of by those who benefited from the energy derived from the nuclear activities which created the waste.” House Report at 29.

Over the decades, there have been attempts to sever the linkage between storage and disposal and thereby allow for a government-owned interim storage site without parallel progress on a repository. Yet the Act’s primary aim to create permanent disposal for nuclear waste remains. That fundamental aim has yet to be achieved, but there is no lack of ongoing effort to reach it. *See infra* at 16. In the following pages, we detail how and why U.S. nuclear waste policy has consistently rejected interim storage of nuclear waste in favor of achieving permanent disposal of nuclear waste, thus illustrating the gravity of the NRC’s violation of the Act.

I. Original Debates

During initial nuclear weapons development of the 1940s, the first nuclear waste was stored in interim storage underground tanks. “Even at the time, however, the underground tanks were not considered a long-term solution; in a 1949 report the Atomic Energy Commission . . . emphasized that ‘better means of isolating, concentrating, immobilizing, and controlling wastes will ultimately be required.’” Blue Ribbon Commission Report at 19. Research on what that long-term solution should be occurred throughout the 1950s and, in 1957, the National

Academy of Sciences for the first time reported that permanent geologic disposal was the most promising solution to nuclear waste. Nat'l Acad. of Sci., *The Disposal of Radioactive Waste on Land: Report of the Committee on Waste Disposal of the Division of Earth Sciences*, 4-6 (1957), <https://www.nap.edu/catalog/10294/the-disposal-of-radioactive-waste-on-land>. Over the decades, the National Academy would continue to stand by this determination. *See, e.g.*, Nat'l Acad. of Sci., *Disposition of High-Level Waste and Spent Nuclear Fuel: The Continuing Societal and Technical Challenges*, 3 (2001), <https://www.nap.edu/catalog/10119/disposition-of-high-level-waste-and-spent-nuclear-fuel-the> (“After four decades of study, geological disposal remains the only scientifically and technically credible long-term solution available to meet the need for safety without reliance on active management.”).

To that end, the Atomic Energy Commission (predecessor to the Department and NRC) in 1971 chose Lyons, Kansas as the location of a permanent nuclear waste disposal facility. House Report at 27. But the project was quickly abandoned. An “intense political attack on the program, followed quickly by revelations of serious technical flaws in the site, are now widely recognized as the landmark event in nuclear waste management history which would color future repository siting activities through the present day.” *Id.* This approach of picking a location first and then figuring out how it might work—which NRDC once

described as “an awful lot like throwing the dart and then going up and drawing the bullseye around it”⁶—has repeatedly been an unsuccessful strategy. *See infra* at 12-13.

While interim storage became attractive in the 1970s for many reasons (not least of which was that an ultimate method of disposal was yet to be established and nuclear waste continued to collect at commercial reactor and weapons development sites), opposition remained strong. The “concern that the easy availability of interim storage would reduce the pressure for developing a Federal disposal system, thereby turning interim storage facilities into de facto permanent waste repositories,” maintained the subservient role of interim measures. U.S. Congress, Office of Tech. Assessment, *Managing the Nation’s Commercial High-Level Radioactive Waste*, 7 (1985), <https://ota.fas.org/reports/8514.pdf>. Thus, multiple attempts at interim storage were consecutively abandoned after receiving heavy criticism due to their likely negative affect on a permanent disposal solution.⁷

⁶ Statement of Dr. Cochran, *supra* n.2, at 2 (at 4 of testimony).

⁷ For example, in 1972 the Atomic Energy Commission announced the development of a 100-year interim Retrievable Surface Storage Facility. The Environmental Protection Agency and others opposed this proposal because it diverted attention and resources from efforts to find a permanent geologic disposal solution and they feared it would become a de facto permanent solution. *See* U.S. Comptroller General, Report to Congress, *Nuclear Energy’s Dilemma: Disposing*

II. A Comprehensive U.S. Statutory Scheme

By the end of the 1970s, Congress and a wide array of interested parties came together to enact comprehensive nuclear waste legislation. The 1982 Act and the 1987 Act Amendments focused on a permanent solution to the issue of nuclear waste with interim measures relegated to a distinctly limited and subservient place. *See* 42 U.S.C. §§ 10151-57 (Interim Storage), 10161-69 (Monitored Retrievable Storage).⁸ Most vitally, the Act maintains the linkage between a permanent repository and interim storage by severely limiting transfer of title of nuclear waste from reactor licensees to the Department until the Department has opened a repository and is ready to receive the waste. *See id.*; *see also*, 42 U.S.C. §§ 10143, 10222(a)(5)(A).⁹ This linkage was maintained through the 1987 amendments to the

of Hazardous Radioactive Waste Safely 8-9 (1977), <https://www.gao.gov/assets/emd-77-41.pdf>.

⁸ Both programs are limited, as opposed to the comprehensive scheme for permanent disposal. *See* Richard B. Stewart & Jane B. Stewart, *Solving the Spent Nuclear Fuel Impasse*, 21 N.Y.U. Envtl. L.J. 1, 62-64 (2014) (“Congress deliberately restricted DOE’s authority to provide consolidated storage.”).

⁹ As noted above, this is because “[t]he Committee strongly recommends that the focus of the Federal waste management program remain, as it is today, on the development of facilities for disposal of high level nuclear waste *which do not rely on human monitoring and maintenance to keep the wastes from entering the biosphere.*” House Report at 29 (emphasis added); *see also id.* at 42 (“The objection most often raised to the concept of large-scale, long-term [monitored retrievable storage, a type of interim storage,] is that it is not compatible with, and

Act that ended the site selection process on both interim and permanent measures and focused all federal efforts on the proposed Nevada repository.¹⁰

III. Continuing Efforts

While efforts to expand federal interim measures continued in the 1990s, all of these efforts failed because, as before, there was a recognized need to not distract from developing a repository.¹¹ A single *commercial* interim storage facility—to be owned and operated by private entities independent of the federal government—successfully received an operating license from the NRC. *See Bullcreek v. NRC*, 359 F. 3d 536, 539-40 (D.C. Cir. 2004). But the storage site has never been constructed, and the license was withdrawn and the site abandoned in 2012.¹² Rather, attention primarily remained on the proposed permanent repository at Yucca Mountain in Nevada in the late 1990s and early 2000s.

may be destructive of, a national or societal goal to dispose permanently of high-level radioactive wastes. . . .”).

¹⁰ *See, e.g.*, 42 U.S.C. § 10162(a).

¹¹ *See, e.g.*, Michael A. Mullett, *Financing for Eternity the Storage of Spent Nuclear Fuel: A Crisis of Law and Policy Precipitated by Electric Deregulation Will Face New President*, 18 Pace Envtl. L. Rev. 383, 414-16 (2001) (explaining that the 104th, 105th, and 106th Congresses introduced legislation to require DOE to construct an interim storage facility, but the Clinton Administration threatened to veto the legislation primarily because a storage facility would divert attention and resources from repository efforts).

¹² The commercial storage facility failed in part because of fears that it would become a *de facto* permanent repository, pressure exerted by Utah and its

Parallel to efforts to develop the Yucca Mountain site, since approximately 1998, utilities have successfully sued the United States for billions of dollars in damages to utilities for the failure of the government to relieve the industry of the waste it creates, and billions more in damages are expected in the years to come. Blue Ribbon Commission Report at 79-80. Further, fees paid by the industry into the nuclear waste fund that supported the repository program have been suspended, and there has been no alteration of the Act's fundamental premise that eventually the federal government must assume the industry's waste disposal burden. *See Nat'l Ass'n of Regul. Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 517, 521 (D.C. Cir. 2013).

IV. The Blue Ribbon Commission

In 2009, the Obama Administration withdrew the license application for Yucca Mountain—deeming the proposal unworkable.¹³ Congress's choice “to

congressional delegation, and concern on the part of the Bush Administration that approval of the facility would undermine the push to develop the Yucca repository. Blue Ribbon Commission Report at 24; Stewart & Stewart, *Solving the Spent Nuclear Fuel Impasse*, 21 N.Y.U. Envtl. L.J. at 86-89.

¹³ *See*, Office of Management and Budget, Terminations, Reductions, and Savings: Budget of the U.S. Government, Fiscal Year 2011, at 62 (Feb. 1, 2010) (“In 2010, the Department will discontinue its application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada.”); *see also*, Stewart & Stewart, *Solving the Spent Nuclear Fuel Impasse*, 21 N.Y.U. Envtl. L.J. at 9.

short-circuit the site selection process established under the original [Act] [by instead] singl[ing] out Yucca Mountain as the sole site for consideration, created a widespread perception that the repository location was being determined on the basis of primarily political, rather than technical and scientific, considerations.” Blue Ribbon Commission Report at 23.¹⁴ The public and stakeholders again recognized that the bullseye was being drawn around the dart as it had at for the first proposed repository in Lyons, Kansas.

After the failure of that project, the bipartisan Blue Ribbon Commission on America’s Nuclear Future was created and, between 2010 and 2012, developed recommendations for future Congresses and Administrations. The Blue Ribbon Commission found:

Deep geologic disposal capacity is an essential component of a comprehensive nuclear waste management system for the simple reason that very long-term isolation from the environment is the *only*

¹⁴ The Blue Ribbon Commission concisely summarized the history of how Congress ultimately picked Yucca Mountain: “[f]aced with a deteriorating political situation and growing recognition that the [Act’s] original timelines and cost assumptions were unrealistic, Congress revisited the issue of nuclear waste management in 1987. The resulting [] Amendments Act of 1987 halted then ongoing research in crystalline rock of the type found in the Midwest and along the Atlantic coast, cancelled the second repository program, nullified the selection of Oak Ridge, Tennessee as a potential [monitored retrievable storage] site, and designated Yucca Mountain as the sole site to be considered for a permanent geologic repository. The decision was widely viewed as political and it provoked strong opposition in Nevada, where the 1987 legislation came to be known as the ‘Screw Nevada’ bill.” Blue Ribbon Commission Report at 22 (internal citation omitted).

responsible way to manage nuclear materials with a low probability of re-use, including defense and commercial reprocessing wastes and many forms of spent fuel currently in government hands. *The conclusion that disposal is needed and that deep geologic disposal is the scientifically preferred approach has been reached by every expert panel that has looked at the issue and by every other country that is pursuing a nuclear waste management program.*

Blue Ribbon Commission Report at xi (second emphasis added).

Debate regarding the necessary strength of interim storage's linkage to the repository program launched yet again. On this topic, the Blue Ribbon

Commission concluded:

To allay the concerns of states and communities that a consolidated storage facility might become a *de facto* disposal site, a program to establish consolidated storage must be accompanied by a parallel disposal program that is effective, focused, and making discernible progress in the eyes of key stakeholders and the public. Progress on both fronts is needed and must be sought without further delay.

Blue Ribbon Commission Report at xii. To be clear, the Blue Ribbon Commission advocated for progress on interim storage with recommendations such as

“[p]erforming the systems analyses and design studies needed to develop a

conceptual design for a highly flexible, initial federal spent fuel storage facility”

and “continu[ing] a vigorous research and regulatory oversight effort in areas such

as [nuclear waste] and storage system degradation phenomena, vulnerability to

sabotage and terrorism” Blue Ribbon Commission Report at 118. But at *no*

point did the Blue Ribbon Commission suggest that the NRC proceed with

licensing a private party to store federally owned spent fuel prior to the creation of a repository.

There is a reason for this that went beyond the consistent concern of the linkage between storage and disposal.¹⁵ The Blue Ribbon Commission rightly recognized that “[s]iting storage or disposal facilities has been the most consistent and most intractable challenge for the U.S. nuclear waste management program.”

Blue Ribbon Commission Report at viii. The Blue Ribbon Commission further stressed:

finding sites where all affected units of government, including the host state or tribe, regional and local authorities, and the host community, are willing to support or at least accept a facility has proved exceptionally difficult. *The erosion of trust in the federal government’s nuclear waste management program has only made this challenge more difficult* Experience in the United States and in other nations suggests that *any attempt to force a topdown, federally mandated solution over the objections of a state or community—far from being more efficient—will take longer, cost more, and have lower odds of ultimate success* [A]ny process that is prescribed in detail up front is unlikely to work.

¹⁵ See Blue Ribbon Commission Report at 39-40 (“[T]he most important objection [against consolidated interim storage] and one that will need to be thoughtfully addressed is the concern that any consolidated storage facility could become a *de facto* disposal facility and—by reducing the pressure to find a long-term solution—thwart progress toward developing the deep geologic disposal capacity that will ultimately be needed. This is not a new concern; it is why the 1987 [Act] Amendments explicitly tied the construction of a [monitored retrievable storage] facility to progress on a first repository and set capacity limits for the [monitored retrievable storage] facility so that it could not accommodate all the spent fuel in need of disposal.”).

Blue Ribbon Commission Report at viii-ix (emphasis added).

Rather than continue the practices of the past 50 years of finding a site and then attempting to adjust the standards to fit (e.g., the failed projects at Lyons, Kansas and Yucca Mountain, Nevada), the Blue Ribbon Commission recommended that the work of setting standards that provide protection of public health, safety, and the environment should be the first step and must happen *before* any specific location is considered (i.e., the bullseye must be drawn before the dart is thrown). The Commission warned that “any attempt to short-circuit the process will most likely lead to more delay.” Blue Ribbon Commission Report at ix-x; *see also id.* at 94 (Recommendation 5) (“Safety and other performance standards and regulations should be finalized prior to the site selection process.”); *id.* at 52-54.

V. Recent Congressional Action on Nuclear Waste

Subsequent to the Blue Ribbon Commission’s recommendations, Congress has considered several attempts at nuclear waste legislation.¹⁶ Each successive

¹⁶ See, e.g., *Nuclear Waste Informed Consent Act*, S. 541, 117th Cong. (2021); *Nuclear Waste Task Force Act of 2021*, S. 2871, 117th Cong. (2021); *Nuclear Waste Task Force Act of 2021*, H.R. 5401, 117th Cong. (2021); *Nuclear Waste Informed Consent Act*, H.R. 1524, 117th Cong. (2021); *STORE Nuclear Fuel Act of 2019*, H.R. 3136, 116th Cong. (2019); *Nuclear Waste Informed Consent Act*, H.R. 1544, 116th Cong. (2019); *Nuclear Waste Policy Amendments Act of 2019*, H.R. 2699, 116th Cong. (2019); *Nuclear Waste Administration Act of 2019*, S. 1234, 116th Cong. (2019); *Nuclear Waste Informed Consent Act*, S. 649, 116th Cong. (2019); *Interim Consolidated Storage Act of 2017*, H.R. 474, 115th Cong. (2017); *Removing Nuclear Waste from our Communities Act of 2017*, H.R. 4442,

attempt has, in some fashion and for better or worse, addressed the issue of the linkage between storage and disposal. None of these efforts have been enacted into law—yet.

In parallel, efforts to develop new interim storage facilities—such as the instant matter before this Court—have continued. Consistent with the fifty-year history of nuclear waste, the potential recipient states have fiercely objected to the interim sites on the basis that they could become de facto permanent sites.¹⁷

ARGUMENT

We amplify the points raised in Petitioner Beyond Nuclear’s brief to note that the NRC actions violate the fundamental mandate of the Act and are likely to exacerbate the nuclear waste problem. All parties agree that “it would be illegal under [the Act] for DOE to take title to the [nuclear waste] at this time.” *Holtec Int’l*, 91 N.R.C. 167, 175 (2020); *see also*, *In the Matter of Interim Storage*

115th Cong. (2017); *Nuclear Waste Policy Amendments Act of 2018*, H.R. 3053, 115th Cong. (2017); *Interim Consolidated Storage Act of 2016*, H.R. 4745, 114th Cong. (2016); *Interim Consolidated Storage Act of 2015*, H.R. 3643, 114th Cong. (2015); *Nuclear Waste Administration Act of 2015*, S. 854, 114th Cong. (2015); *Nuclear Waste Administration Act of 2013*, S. 1240, 113th Cong. (2013); *Nuclear Waste Administration Act Of 2012*, S. 3469, 112th Cong. (2012).

¹⁷ *See supra* n.2, at 2, *Nuclear Waste Administration Act of 2019: Hearing on S. 1234 Before the S. Comm. on Energy & Nat. Res.* 116th Cong. (June 27, 2019) (objections from New Mexico and Texas, Attachments B and C *in* statement of Geoffrey H. Fettus, Senior Attorney, NRDC).

Partners LLC, 92 N.R.C. 463, 467 (2020). By issuing a license for interim storage with this allowance, NRC exceeds the statutory authority Congress provided the agency in the Act. Further, the manner in which NRC violates the central premise of the Act mirrors the same strategy that has repeatedly failed and which the Blue Ribbon Commission specifically warned would delay resolution of the nuclear waste issue—a resolution that *already* has been delayed decades. Simply put, an agency cannot violate its statutory authority or any statutory prohibitions. Any party that wants to change the statutory authority or prohibitions has to do that in Congress.

In the historical framework we outlined above, and over the years of controversy, there have been multiple attempts to sever the linkage between storage and disposal and thereby allow for a government owned interim storage site without parallel progress on a repository. Various industry proponents have lobbied for severing the linkage. In response, Senate and House members on both sides of the aisle protecting their own states from interim storage sites, a bipartisan collection of several states, Tribes, and others have successfully forestalled these efforts. Yet since the passage of the Act, all parties have followed the same basic strategy. Everyone has agreed that Congress is the proper venue to petition for changing an existing legal mandate. The instant matter is a different twist on an old story.

Two holdings of this Court capture how NRC has overstepped its statutory authority.

First, in *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), this Court granted South Carolina's and Washington's petition for writ of mandamus that the NRC must continue with the Yucca Mountain licensing process in accordance with the Act "unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining." *Id.* at 267. There (and in an appropriations context), the Court held that

an agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates. A judicial green light for such a step—allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action—would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive's power at the expense of Congress.

Id. at 260.

In the instant matter, the NRC again ignored a statutory prohibition by approving an action that violates the fundamental premise of the Act (i.e., permanent disposal). And it compounds its harm by the fact that the manner in which the agency violates existing legal mandates follows precisely what the Blue Ribbon Commission warned against—an expedient, federally mandated solution that runs right over the objections of Texas and New Mexico. *See* Blue Ribbon Commission Report at 48 (identifying problems plaguing the Yucca Mountain

process, including “[s]hort-circuiting of the initial site selection process that had the effect of tainting all subsequent state-federal interactions over the project”); *see also supra* n.2, at 2, *Nuclear Waste Administration Act of 2019: Hearing on S. 1234 Before the S. Comm. on Energy & Nat. Res.* 116th Cong. (June 27, 2019) (objections from New Mexico and Texas, Attachments B and C *in* statement of Geoffrey H. Fettus, Senior Attorney, NRDC). The Blue Ribbon Commission wrote, “[e]xperience in the United States and in other nations suggests that *any attempt to force a top-down, federally mandated solution over the objections of a state or community—far from being more efficient—will take longer, cost more, and have lower odds of ultimate success.*” Blue Ribbon Commission Report at ix. Texas’s and New Mexico’s clearly stated objections to the Interim Storage Partners’ site presage the litigation, controversy, and years of acrimony that seem imminent should this license stand.

Second, in *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016), the Court affirmed the NRC’s assertion that nuclear waste can safely be stored at reactors where it currently sits *in perpetuity* on the basis of the NRC having posited that institutional controls at reactor storage sites also can exist in perpetuity. *Id.* at 1023. The Court concluded its analysis with the admonition “[t]o the extent that the petitioners disagree with the NRC’s current policy for the continued storage of [nuclear waste], their concerns should be directed to Congress.” *Id.*

The Court held that we direct our policy concerns to Congress, and we have done so. Here, if the NRC deems it wise to grant a license that authorizes a private company to store nuclear waste owned by the Department when there is no current permanent repository (which all parties agree is currently prohibited by the Act), the agency should direct those concerns to Congress, not violate the Act.

By exceeding its lawful authority, the NRC does precisely what the Blue Ribbon Commission warned would lead to failure—“short-circuiting . . . the initial site selection process . . . [will have] the effect of tainting all subsequent state-federal interactions over the project.” Blue Ribbon Commission Report at 48. By granting this license, the NRC violates existing legal mandates and, in our view, ensures the likely and continued failure to permanently dispose of nuclear waste.

CONCLUSION

The Court should not countenance the NRC’s action and should vacate Interim Storage Partners’ license.

Respectfully submitted,

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Dated: March 25, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this amicus brief is in compliance with Fed. R. App. P. 29(a)(4-5) and 32(a)(4-7). The brief contains 5239 words—excluding the parts exempted by Fed. R. App. P. 32(f)—and was prepared in 14-point Times New Roman font using Microsoft Word.

Dated: March 25, 2022

/s/ Caroline Reiser
Caroline Reiser

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25(a), that on March 25, 2022, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: March 25, 2022

/s/ Caroline Reiser
Caroline Reiser